

A **Habibah bte Mohd Zaman v
Pan Global Insurance Bhd & Anor**

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2-25-
62 OF 2000

FAIZA TAMBY CHIK J

B 31 JANUARY 2001

Labour Law — Industrial Court — Finding of fact — Constructive dismissal — Transfer amounting to demotion — Failure of Industrial Court to consider submission of dismissed applicant — Whether failure of applicant to carry out responsibilities in new department relevant consideration — Whether High Court could disagree with Industrial Court's finding of facts

C The applicant was in the employment of the first respondent. She was transferred from the Executive Central Filing to the Executive Administration (General Services) Department which job functions, responsibilities and duties are far less from those in the former.

D The applicant considered the far less functions, responsibilities and duties in the Administration (General Services) Department a demotion. The applicant by a letter served a sufficient notice by way of protest after 3½ days at the new position at Administration (General Services) to the first respondent to rectify the matter and the first respondent replied in a meeting that it would not change its stand. Thereafter the applicant considered herself constructively dismissed for reasons that the transfer letter gave no reasons for the transfer and alleged that the transfer was done with an improper motive to victimize the applicant and causing the applicant loss of estimation among her fellow colleagues thus making it impossible for the applicant to carry on being in the employment of the first respondent. The applicant subsequently lodged a complaint to the Ministry of Human Resources under s 20 of the Industrial Relations Act 1967 and the matter was subsequently referred to the Industrial Court (the second respondent) whereby an award was handed down against the applicant. The applicant applied for judicial review for an order of certiorari to quash the decision of the Industrial Court and for an order of mandamus directed to the Industrial Court to hear and determine the case according to law by a different division from that which made the award.

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H **Held**, allowing the application:

I (1) The Industrial Court had failed to see that the transfer of the applicant was because the Human Resource and Administration Department of the first respondent was unhappy on its failure at the domestic inquiry to prove serious charges such as theft against the applicant. The Industrial Court had erred in law in ignoring a pleading in the applicant's statement of case to that effect and by not considering the submission of the applicant (see pp 345F, 346D).

- (2) The first respondent's contention that the applicant had not attempted to carry out her duties need not be an issue at all as the requirement of the law in the case of *Wong Chee Hong v Cathay Organization* [1988] 1 MLJ 92 does not require the applicant to make any attempt to perform the functions once the applicant considered herself doing a far less responsible job. Furthermore, the Industrial Court had failed to compare the functions, duties and responsibilities of the applicant in the Central Filing, as opposed to the functions, duties and responsibilities in the General Services which the applicant performed for 3½ days (see p 347H-I). A B
- (3) The applicant was transferred to General Services under an order of the first respondent soon after the domestic enquiry. It was therefore reasonable for the applicant to elect to remain silent because of fear of insubordination. Therefore silence on the part of applicant due to this fear did not vitiate her right to aver the same in her affidavit. This was an inference the Industrial Court had failed to draw from the facts of the case (see p 349H-I). C D
- (4) The Industrial Court if it had scrutinized the pleadings of the first respondent would have come to a conclusion that reorganization was never pleaded. This fact was brought to the attention of the Industrial Court by the applicant's submission. In spite of this, the Industrial Court had found as a fact that there was reorganization. Therefore it was clear that the Industrial Court had erred in law (see p 351C-D, H). E
- (5) If the Industrial Court has accepted or rejected the evidence of a particular witness and goes on to make a finding based on such acceptance or rejection, the High Court is bound to accept such finding; *Air Space Management Services Sdn Bhd v Co (B) Harbans Singh a/l Chingar Singh* [2000] 3 AMR 3009 followed. However, the High Court is entirely competent to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from its finding of facts on the ground that no reasonable tribunal in the same position would have arrived at such a conclusion or drawn such an inference (see pp 351H-352A). F G

[Bahasa Malaysia summary]

Pemohon merupakan pekerja responden pertama. Beliau telah dipindahkan daripada Pusat Pemfailan Eksekutif ke Bahagian Pentadbiran (Perkhidmatan Am) Eksekutif yang mempunyai fungsi-fungsi, tanggungjawab-tanggungjawab dan tugas-tugas yang jauh lebih kurang daripada yang asalnya. Pemohon menganggap fungsi-fungsi, tanggungjawab-tanggungjawab dan tugas-tugas yang jauh lebih kurang tersebut di Bahagian Pentadbiran (Perkhidmatan Am) Eksekutif sebagai satu penurunan pangkat. Pemohon melalui sepucuk surat yang merupakan notis bantahan yang mencukupi setelah 3½ H I

- A hari memegang jawatan baru di Pentadbiran (Perkhidmatan Am) kepada responden pertama untuk membetulkan perkara tersebut dan responden pertama menjawab di dalam mesyuarat bahawa ia tidak akan menukar pendiriannya. Berikutan itu pemohon telah menganggap dirinya telah dipecat secara konstruktif atas sebab-sebab bahawa surat pemindahan tersebut tidak memberikan apa-apa sebab untuk pemindahan tersebut dan mendakwa bahawa pemindahan tersebut telah dibuat dengan motif yang tidak betul bagi pemohon untuk terus menjadi pekerja responden pertama. Pemohon kemudiannya telah membuat aduan kepada Kementerian Perhubungan Awam di bawah s 20 Akta Perhubungan Perusahaan 1967 dan perkara ini seterusnya telah dirujuk kepada Mahkamah Perusahaan (responden kedua) di mana satu award yang menentang pemohon telah diberikan. Pemohon telah membuat permohonan untuk kajian semula kehakiman untuk satu perintah certiorari bagi membatalkan keputusan Mahkamah Perusahaan dan untuk satu perintah mandamus yang diarahkan kepada Mahkamah Perusahaan bagi mendengar dan menentukan kes tersebut menurut undang-undang oleh satu bahagian yang lain daripada yang telah membuat award tersebut.
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Diputuskan, membenarkan permohonan tersebut:

- E (1) Mahkamah Perusahaan telah gagal untuk melihat bahawa pemindahan pemohon adalah kerana Bahagian Perhubungan Awam dan Pentadbiran responden pertama tidak gembira dengan kegagalannya semasa siasatan domestik untuk membuktikan pertuduhan-pertuduhan yang serius seperti kecurian terhadap pemohon. Mahkamah Perusahaan telah khilaf di sisi undang-undang kerana tidak memperdulikan satu pliding di dalam penyataan kes pemohon tersebut dan dengan tidak mempertimbangkan hujah pemohon tersebut (lihat ms 345F, 346D).
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- G (2) Hujah responden pertama bahawa pemohon tidak berusaha untuk menjalankan tugas-tugas beliau tidak langsung perlu dijadikan persoalan kerana keperluan undang-undang di dalam kes *Wong Chee Hong v Cathay Organization* [1988] 1 MLJ 92 tidak menghendaki pemohon membuat apa-apa usaha untuk melaksanakan fungsi-fungsi tersebut setelah pemohon menganggap dirinya membuat satu tugas yang jauh lebih kurang tanggungjawabnya. Tambahan pula, Mahkamah Perusahaan telah gagal untuk membandingkan fungsi-fungsi, tugas-tugas dan tanggungjawab-tanggungjawab pemohon di Pusat Pemfailan dengan fungsi-fungsi, tugas-tugas dan tanggungjawab-tanggungjawab beliau di Perkhidmatan Am yang pemohon telah laksanakan selama 3½ hari tersebut (lihat ms 347H-I).
- H
- I (3) Pemohon telah dipindahkan ke Perkhidmatan Am di bawah satu arahan daripada responden pertama sejurus selepas siasatan

domestik. Adalah demikian munasabah bagi pemohon untuk memilih untuk mendiamkan diri kerana takut mengingkar. Oleh itu sifat mendiamkan diri di pihak pemohon kerana rasa takut ini tidak menjadikan hak beliau untuk menegaskan yang sama dalam affidavit beliau tidak sah. Ini adalah satu inferen yang gagal dibuat oleh Mahkamah Perusahaan daripada fakta-fakta kes tersebut (lihat ms 349H–I).

- (4) Mahkamah Perusahaan jika ia telah meneliti pliding-pliding responden pertama akan tiba kepada satu kesimpulan bahawa penyusunan semula tersebut tidak pernah diplikkan. Hakikat ini telah dibawa ke perhatian Mahkamah Perusahaan oleh hujah pemohon. Walaupun demikian, Mahkamah Perusahaan mendapati sebagai hakikatnya bahawa terdapat penyusunan semula. Oleh itu adalah jelas bahawa Mahkamah Perusahaan telah khilaf di sisi undang-undang (lihat ms 351C–D, H).
- (5) Sekiranya Mahkamah Perusahaan telah menerima atau menolak keterangan saksi tertentu dan terus membuat satu penemuan berdasarkan penerimaan atau penolakan tersebut, Mahkamah Tinggi terikat untuk menerima penemuan sedemikian; *Air Space Management Services Sdn Bhd v Co (B) Harbans Singh a/l Chingar Singh* [2000] 3 AMR 3009 diikuti. Namun begitu, Mahkamah Tinggi sememangnya kompeten untuk tidak bersetuju dengan Mahkamah Perusahaan tentang kesimpulan-kesimpulan atau inferen-inferen yang diperolehi oleh Mahkamah Perusahaan daripada penemuan-penemuan faktanya atas alasan tiada tribunal yang munasabah dalam kedudukan yang sama yang mungkin boleh tiba kepada satu kesimpulan atau membuat satu inferen sedemikian (lihat ms 351H–352A).]

Notes

For cases on the Industrial Court generally, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1177–1372.

Cases referred to

- Air Space Management Services Sdn Bhd v Co (B) Harbans Singh a/l Chingar Singh* [2000] 3 AMR 3009 (folld)
- Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 (refd)
- Chua Yeow Cher v Tele Dynamics Sdn Bhd* [2000] 1 MLJ 168 (refd)
- Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia* [1995] 3 MLJ 369 (refd)
- Kuala Lumpur Golf and Country Club v Sapani Sharif* (1999) 1 ILR 1000 (refd)
- R Rama Chandran v The Industrial Court of Malaysian & Anor* [1997] 1 MLJ 145 (refd)
- Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 (refd)

- A *Western Excavating Ltd v Sharp* [1978] 1 KB 761 (refd)
Wong Chee Hong v Cathay Organization [1988] 1 MLJ 92 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20(3)

- B *K Paramanathan (P Gunasegaran and WC Wong with him)*
(*Paramanathan & Co*) for the applicant.
HC Yong (Ng Yook Woon Andrew TC Saw & Co) for the first respondent.

- C **Faiza Tamby Chik J.:** This is an application for judicial review for an order of certiorari to quash the decision of Industrial Court Award No 271/2000 ('the Award') dated 25 May 2000, and for an order of mandamus directed to the Industrial Court to hear and determine the case No 3/4-290/98 according to law by a different division from that which made the said Award of the applicant's representation under s 20(3) of the Industrial Relations Act 1967 ('the Act'). In his affidavit affirmed on 4 July 2000, the
- D applicant briefly states the facts of the case as follows: the applicant was in the employment of the first respondent until the time the applicant constructively dismissed herself from the employment of the first respondent. The constructive dismissal of the applicant was a result of the transfer of the applicant from Executive Central Filing to Executive Administration (General Services), which job functions, responsibilities and duties are far less from those of the job functions, responsibilities and
- E duties in central filing. The applicant reasonably believes that the transfer came about as a result of the unreasonable complaint actuated by malice of the applicant's five subordinates. Thus, the applicant considers that the far less responsible job functions, responsibilities and duties in the Administration (General Services) department was a demotion. Therefore,
- F the applicant, by a letter dated 24 September 1997, marked as exh HMNZ-14 at p 82 of the applicant's affidavit, served a sufficient notice by way of protest after three and a half days at the new position at Administration (General Services) to the first respondent to rectify the matter, and the first respondent replied in a meeting held on 30 September 1997 that the first respondent would not change its stand. Therefore, the applicant
- G constructively dismissed herself for reasons that the transfer letter dated 16 September 1997, marked as exh HGMZ-13 at pp 80-81 of applicant's affidavit, gave no reasons for the transfer and was done with an improper motive to victimize the applicant, humiliating, frustrating and causing loss of estimation among the applicant's fellow colleagues and employees, thus making it impossible for the applicant to carry on being employed in the
- H employment of the first respondent. Thereafter, the applicant lodged a complaint to the Regional Industrial Relations Office Ministry of Human Resources under s 20 of the Act, and the matter was subsequently referred to the Industrial Court (second respondent) registered as case No 3/4-290/98, whereby the second respondent handed down an award no 271/2000.
- I The jurisprudence of judicial review is well explained by the dissenting opinion of Wan Yahya FCJ in *R Rama Chandran v The Industrial Court of Malaysian & Anor* [1997] 1 MLJ 145 at p 199 where he said:

The role of the High Court when exercising its supervisory jurisdiction on such instance as initially laid down in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 and *Associated Provincial Picture Houses v Wednesbury* [1948] 1 KB 223, has been explicitly spelled out in various judgments of our courts. I need only to refer to the illuminating judgment of Jemuri Serjan SCJ (as he then was) in *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 at pp 420, 421 wherein he dealt with both the *Anisminic* and *Wednesbury* principles and in particular to the reproduction of Lord Reed's speech during which the following words appeared:

'It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decisions is a nullity. But in such cases, the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.'

He went on further and said at p 199 at para H:

In our present appeal, the failure of the Industrial Court to consider the issue raised by the appellant amounts to a serious error of fact and law which affected the jurisdiction of that court. In that event, even if the Industrial Court appeared to be hearing an application well within its jurisdiction, the error of law as revealed in the face of its record would entitle the High Court in exercising its supervisory function to quash that order.

Further, the subject of review was earlier brought in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 at pp 359–360, VC George JCA said:

In the course of the submissions made to us, Gopal Sri Ram JCA invited counsel's attention to the *House of Lords decision in page v Hull University Visitor* [1993] AC 682; [1993] 1 All ER 97 in which it can be seen that the effect of *Anisminic* was referred to both by the coram in that case, and by Lord Diplock, to whose speech in *O'Reilly v Mackman* [1983] 2 AC 237; [1982] 3 All ER 1124, reference was made, to mean something diametrically opposite to the effect given to *Anisminic* by *Fire Bricks*. Lord Browne-Wilkinson said at [1993] AC 682 at p 701; [1993] 1 All ER 97 at p 107:

'In my judgment the decision in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208, rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision-making

- A power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires. Professor Wade considers that the true effect of the *Anisminic* case is still in doubt; see *Wade* at p 299 ff. But in my judgment the decision of this House in *O'Reilly v Mackman* [1983] 2 AC 237; [1982] 3 All ER 1124, establishes the law in the sense that I have stated.
- B Lord Diplock, with whose speech all the other members of the committee agreed, said that the decision in the *Anisminic* case:
- C “... has liberated English public law from the fetters that the courts had therefore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that *Anisminic* made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported ‘determination’ not being ‘a determination’ within the meaning of the empowering legislation, was accordingly a nullity. (See [1983] 2 AC 237 at p 278; [1982] 3 All ER 1124 at p 1129).”
- D
- E I am of the opinion that the second respondent had failed to consider para 12 of the statement of case which reads as follows:
- The claimant contends, and will contend that the decision to transfer was mala fide and not bona fide on the part of the company. It amounted to an act to punish the claimant, in addition to the warning already served on her on 16 September 1997.
- F The second respondent failed to see that the transfer of the applicant was because the human resource and administration department of the first respondent was unhappy on its failure at the domestic enquiry to prove the serious charges, such as theft, and the applicant was given a warning as punishment. If the second respondent had considered the submission of the applicant, it would have come to a different conclusion. The applicant’s submission at pp 190–191 of the applicant’s affidavit is as follows:
- G At p 39 of the company’s bundle of documents, at the domestic enquiry, the person who defended the claimant (her colleague) objected to the then assistant manager being the investigating officer and the prosecuting officer at the domestic enquiry.
- H At p 41 of the company’s bundle of documents, the then assistant manager admitted that he investigated the case.
- So, we have a case of the investigator/prosecutor/unfair labour practiser (the then assistant manager of human resources and administration department, one En Abdul Harris Faizal) personally handing over the letter of transfer and telling her to pack her things to come up to the 5th floor.
- I This is the same person to whom the claimant’s lawyer had sent a letter before the domestic enquiry that he and the company had defamed her (see p 1 of claimant’s bundle of documents: this letter was addressed to En Abdul

Harris Faizal in his personal capacity as well). The findings of the enquiry were accepted by the claimant, and it showed that she was not guilty of theft, which was the most serious of the charges. The investigator/prosecutor/unfair labour practiser became more personally involved to see the claimant transferred.

A

I must remind myself of what HC Arora and SL Sachdeva said in their book entitled *Law Relating to Transfer and Deputation of Employees* at pp 6–7:

B

The right to transfer an employee is a powerful weapon in the hands of the employer. Sometimes, it is more dangerous than other punishments. Recent history bears testimony to this. It may, at times, bear the mask of innocuousness. What is ostensible in a transfer order may not be the real object. Behind the mask of innocence may hide sweet revenge, a desire to get rid of an inconvenient employee or to keep at bay an activist or a stormy petrel. When the court is alerted, the court necessarily has to tear the veil of deceptive innocuousness and what exactly motivated the transfer. This court can and should in cases, where it is satisfied that the real object of the transfer is not what is apparent, examine what exactly was behind the transfer.

C

Therefore, by ignoring the pleading in para 12 given above, and by not considering the above submission of the applicant, the second respondent has erred in law as it is trite law that it should consider the pleadings, arguments, etc.

D

The first respondent contended that the applicant has not proved or established ‘dismissal’. Lawton LJ in *Western Excavating Ltd v Sharp* [1978] 1 KB 761 at pp 771–772 construed the concept as to what meaning was to be applied to dismissal. His ultimate conclusion would be that ‘dismissal’ is a noun connoting a state of affairs; the conditions of being sent away. What in law constitutes the state of affairs would mean in the circumstances, the applicant considers herself to be dismissed. I am of the view that what the applicant ‘considers’ subjectively is the requirement under s 20 of the Act. The first respondent’s contention that the applicant’s functions are wholly administrative in nature in the same department has no basis and is disputed by the applicant. What are important are the functions, duties and responsibilities in the general service department. Considering the fact that the applicant was employed for 18 years with the first respondent, why give the applicant a brief summary of her responsibilities in the general services department? A question remains unanswered: what is the motive of the first respondent? The answer is shown below.

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At p 201 of the applicant’s affidavit (from the written submission of the applicant to the Industrial Court) which reads as follows:

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It has been said that a picture speaks a thousand words, and it is submitted that a list of duties also speaks a thousand words. It is surprising that the duty lists of COW-2 and COW-3 were not produced. The production of these duty lists would have enabled the court to see what their duties were and whether they had handed over the least responsible duties or the most responsible duties to the claimant.

I

It has been shown, as a fact in para 5 of this submission, that although the claimant was in the same department in her former job at cental filing, she had no duty list.

- A Non-production of the duty lists of COW-2 and COW-3 can lead to only one conclusion: the claimant was the only one in the department with a duty list. Why?

When the applicant was being cross examined, the court asked the following questions at p 236 of the applicant's affidavit:

B

Q Court: Do you have a list of job functions given to you when you were employed as exec filing.

A: No.

C

At p 42 of applicant's affidavit, the applicant has stated in para 17 that she verily believed that the previous officers and the clerk who assigned to her their job functions and responsibilities had no list of job duties assigned to them.

The applicant, in her submission, stated at p 17 that:

D

The first respondent has failed to state the reasons as to why those who handed over part of their duties to the applicant had no list of duties.

Up to date, the first respondent has not said why the applicant was the only one who had a list of duties.

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Does this not show mala fide?

I therefore conclude that the second respondent has erred in law as it has not considered the applicant's arguments.

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The whole thrust of the first respondent's contention is that the work in both the administration general services and central filing was administrative in nature. The second respondent also agreed to this contention and thus found no fundamental breach which goes to the root of the contract. The thrust of the applicant's submission is that the job functions, duties and responsibilities should be considered. I think the use of labels attached to a particular job is misleading; one should look at the job functions, duties and responsibilities. In *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia* [1995] 3 MLJ 369 at p 383 the court said:

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This shows the true principles: that it is the function of and the duties actually discharged by the particular claimant that is important and not merely the label that is attached to the particular employment or indeed the purpose of the engagement.

H

The first respondent's contention that the applicant has not attempted to carry out her duties need not be an issue at all as the requirement of the law in *Wong Chee Hong v Cathay Organization* [1988] 1 MLJ 92 does not require the applicant to make any attempt to perform the functions once the applicant regards or considers herself doing a far less responsible job. I think the second respondent failed to compare the functions, duties and responsibilities of the applicant in central filing as opposed to the functions, duties and responsibilities in general services, which the applicant performed for three and a half days.

I

The transfer of the applicant to general services was not the first and only transfer in her entire 18 years of working life with the first respondent. The applicant recognizes the prerogative of the management to transfer, but also its limitations in respect of transfers. The applicant offers no challenge to the issue of the prerogative of transfer, save that the right to transfer is not used abusively or mala fide. The applicant has at pp 27–28 of the applicant's submission laid out the limitation to the transfer, ie:

- (i) There is nothing to the contrary in the terms of employment:

The first respondent disregarded the terms of employment as to the functions, duties and responsibilities of the applicant transferring her to a far less responsible job, to the general services department.

- (ii) The management has acted bona fide and in the interests of its business:

To this, we humbly submit that the management has acted mala fide in that the applicant was not consulted on the transfer, where no reasonable employer would have undertaken such a step with a long serving employee.

- (iii) The management is not actuated by any indirect motive or any kind of mala fide:

To this we humbly submit that the management is actuated by indirect motive or mala fide.

- (iv) The transfer is not made for the purpose of harassing and victimizing the workmen:

To this we humbly submit that the transfer was made for the purpose of putting the applicant to inconvenience and loss of estimation, and unreasonably assuming that there would be disharmony as the following will show.

If the second respondent had considered the applicant's submission at pp 202–203 of the applicant's affidavit, which reads as follows, it would not have accepted preservation of industrial harmony as a valid ground for the applicant's transfer:

The company's witness, COW–4, on cross examination said there were 150 executives in insurance related work.

During cross examination of the claimant, it was shown that she rose from Grade E8 to E7 while continuing to occupy the same post at central filing. It was also brought in during examination in chief of COW–3 that COW–3, although in Grade E6, was occupying the post similar to others in E7.

As such, the claimant could been posted to any of the insurance related departments by way, for example, by mutual transfer and industrial peace would have been maintained.

It is submitted that the transfer of the claimant was effected to take sweet revenge.

A The above is confirmed from the notes of evidence recorded at p 285 of the applicant's affidavit, which reads as follows:

Q: (witness referred to CL-4) altogether seven exec positions in that HR & Admin.
How may execs did you have in your insurance related departments?

B A: About 150.

C Therefore the first respondent could have transferred the applicant to one of the 150 executive positions in insurance related work when she sent her letter dated 24 September 1997 (see p 82 of the applicant's affidavit), whereby she wanted the matter rectified as she felt that she was demoted. This was not done.

D It is clear that the stand of the first respondent was that it could transfer an employee to preserve industrial harmony, but it reserved the right not to practise good industrial relations, as the following will show (at p 286 of the applicant's affidavit):

Q: You said if she was not transferred, there would be disharmony between her and her subordinates. Why did you not mention this in the transfer letter?

E A: Because it was not necessary.

By its failure to consider the above, the second respondent has erred in law as it had not considered the applicant's arguments.

(v) The transfer does not involve a change in the conditions of service:

F The applicant's transfer to mere clerical duties as described in para 8 at pp 44–45 of the applicant's affidavit clearly indicates a change in the conditions of service.

Thus, the first respondent has committed a fundamental breach going to the root of the contract of employment.

G The second respondent has not applied the contract test to the facts and inference of the facts. The first respondent contended that the applicant never raised fear of insubordination. I think it is accepted that disobedience to a lawful order of an employer is insubordination, and this would result in disciplinary action. In the instant case, the facts will show that the applicant was transferred to general services under an order of the first respondent soon after the domestic enquiry. It is therefore reasonable for the applicant to elect to remain silent because of this fear. This is consistent to the state of mind of a person who had just been punished with a warning soon after a domestic enquiry. Therefore silence on the part of the applicant of this fear does not vitiate her right to aver the same in her affidavit. This is an inference the second respondent failed to draw from the facts of the case. And the case of *Chua Yeow Cher v Tele Dynamics Sdn Bhd* [2000] 1 MLJ

168, adduced by the first respondent, is of no relevance to the issue. The facts of the case indicate that this case is based on transfer from one branch to another, whereas our instant case is a case of transfer within the department. It must be observed that the first respondent's contention on lateral interdepartmental transfer is not a dispute at all, save the job functions, duties and responsibilities. The applicant's prior position was not an issue and the applicant never complained about the transfer to central filing.

I am of the view that if the need is on the applicant to familiarize herself with hew new job, which is the contention of the first respondent, then any delay in giving notice would be a condonation of the fundamental breach of contract. It is in evidence that company witness no 3 (COW-3), an administration executive's answer to the cross examination by the applicant's counsel was as follows:

Q: How long did you take to know your work since you joined the company?

A: Probably about a month (at p 274 of applicant's affidavit).

Hence, a month would show condonation of the breach by the applicant. The applicant being a long serving employee of 18 years with the first respondent and who had undergone transfers to other insurance related departments, would be in a good position to make an assessment of the new position and find the new position as far less responsible (at pp 198-199 of the applicant's affidavit). The first respondent's argument that condonation would only apply where a person who has had the full understanding and comprehension of the circumstances he is faced with, fails to take action even though it is so glaring that there is apparent detriment. However in the instant case, the applicant in the circumstances considered herself dismissed. The applicant, after three and a half days at the new position, sent a notice dated 24 September 1997 to the first respondent 'to rectify the matter', and waited from 24 September 1997 to 30 September 1997 for the response from the first respondent which came at the closing minutes of that date, ie 30 September 1997. The response of the first respondent was that it would not change its stand on the matter. In the circumstances of the case, the applicant's failure to act would amount to a condonation. By virtue of the principles of *Wong Chee Hong v Cathay Organization*, the applicant should make up her mind and act at the appropriate point in time soon after the conduct complained of has taken place. In this instance, the applicant should act at the appropriate point in time soon after the conduct, and that would be immediately after the act complained of, ie the reply to the effect that the first respondent would not change its stand on the matter. The first respondent's reference to the case of *Kuala Lumpur Golf and Country Club v Sapani Sharif* (1999) 1 ILR 1000 on the prematurity on the part of the employee can hold no water. The ratio decidendi in *Wong Chee Hong v Cathay Organization* requiring the applicant to act at the appropriate point in time failing which waiver would be presumed under the *Wong Chee Hong v Cathay Organization*. I am of the view that the case of *Kuala Lumpur Golf*

A *and Country Club v Sapanai Sharif* (1999) 1 ILR 1000 has no relevance here as it involves a case on reorganization. There is no such pleading on reorganization by the first respondent in his pleadings. It is trite law that a party is bound by its pleadings. In *R Rama Chandran v The Industrial Court of Malaysian & Anor* [1997] 1 MLJ 145 it is stated:

B It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinize the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regards to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil court (s 30) of the Act) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to wrong conclusion.

In the instant case, the second respondent, if it had scrutinized the pleadings of the first respondent would have come to a conclusion that reorganization was never pleaded. This fact was brought to the attention of the second respondent by the applicant's submission at the Industrial Court as shown below (at p 199 of the applicant's affidavit):

E Respectfully, we urge Yang Arif to distinguish this case from the case of *Kuala Lumpur Golf and Country Club v Sapani Sharif* (1999) 1 ILR 945, wherein Yang Arif had held that an employee who had worked in the new position for four and a half days had reacted prematurely in claiming constructive dismissal. It was held by Yang Arif that the claimant employee should have stayed on a little longer until the reorganization exercise had been completed and situations were a bit clearer.

F We submit that this case before Yang Arif is different from that of *Sapani's* case on its facts. Moreover, the reorganization of the human resources and administration was brought out for the first time during the cross examination of COW-4, and it is submitted that it was not pleaded in the company's pleadings.

So it is not reliable for Yang Arif to draw a similar conclusion on this case.

G In spite of drawing the attention of the second respondent to this point of law, it had ignored it and found as a fact that there was reorganization. This is clear from p 218 of the applicant's affidavit, where the second respondent had used *Sapani's* case as authority for his conclusion that working for three and a half days was not enough. The ratio decidendi of *Sapani's* case is that when there is reorganization, the person in the new job should stay a little longer until the situation has become clearer. Therefore, it is clear that the second respondent has erred in law.

H From the case of *Air Space Management Services Sdn Bhd v Co (B) Harbans Singh a/l Chingar Singh* [2000] 3 AMR 3009, it is clear that if the Industrial Court has accepted or rejected the evidence of a particular witness, and goes on to make a finding based on such acceptance or rejection, the High Court is bound to accept such a finding. However, it is also clear that the High Court is entirely competent to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from

its findings of facts on the ground that no reasonable tribunal in the same position would have arrived at such a conclusion or drawn such an inference. There the court stated:

On the other hand, we accept, of course, that it is entirely competent for the High Court in certiorari proceedings to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from the proved or admitted evidence on the ground that no tribunal similarly circumstanced would have arrived at such a conclusion or drawn such an inference.

Here, on the facts and inference of the instant case, the second respondent has not applied the 'contract test' correctly to the facts and inferences. In *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at p 1173, Lord Brightman referred to Lord Everhed's consideration to a 'danger of usurpation of power on the part of the court ... under the pretext of having regard to the principles of natural justice'. He added:

I do observe again that it is not the decision on such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present, the need for giving to the party dismissed an opportunity of putting his case.

In such circumstances, I allow for an order in terms of (1), (2) and (3) of the application with costs.

Application allowed.

Reported by Wong Siok Chin

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